1908

NANNHI JAN v. BHUBI.

resiled from the position which he took up in it and took part in the decision of the case of *Ram Nath* v. *Bindraban*, which we have cited. Now the learned District Judge has considered the evidence from an entirely wrong standpoint, and it is impossible for us to accept his conclusion on the question whether the sale to the plaintiff was a real transaction or not, in view of the course adopted at the trial. We therefore, as was done in *Govind Atmaram* v. *Santai*, set aside the decree and remand the case to the lower appellate Court for re-trial. We accordingly remand the case with directions that it be replaced in the file of pending appeals in its proper number and be disposed of on the merits, regard being had to the directions which we have given above. The costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

1908
April 30.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Aikman.

SULTAN BEGAM AND OTHERS (DEFENDANTS) *v.* DEBI PRASAD (PLAINTIFF).*

Act No. IV of 1893 *(Partition Act), section* 4—*Act No. IV of* 1882 *(Transfer of Property Act), section* 44—*"Undivided family"*—*Section* 4 *of Partition Act applicable to Muhammadans.*

Held that Muhammadans are not excluded from the benefit of section 4 of the Partition Act, Act No. IV of 1893. *Kalka Parshad* v. *Bankey Lall* (1) approved. *Amme Raham* v. *Zia Ahmad* (2) referred to. *Hashmat Ali* v. *Muhammad Umar* (3) overruled.

THIS case was referred by the Chief Justice to a Bench of three Judges for the decision of a point of law arising therein. The facts of the case and the nature of the legal question to be decided appear from the following order of the Bench before which the appeal came on for hearing :—

STANLEY, C.J., and BURKITT, J.—The only question now remaining for determination in this appeal is one as to the true construction of section 4 of the Partition Act, IV of 1893. The suit is one for partition of property situate in Cawnpore, which consists of an enclosed area on which stands an Imambara and

* First Appeal No. 92 of 1906 from a decree of Prag Das, Subordinate Judge of Cawnpore, dated the 2nd of January 1906.

(1) (1906) 9 Oudh Cases, 158. (2) (1890) I. L. R. 13 All., 282.
(3) (1907) I. L. R. 29 All., 308.

also a dwelling house known as Mahal Sarai. The property, it is said, formerly belonged to members of the family of the Nawab Wazir of Oudh. The shares of three members of the family were purchased at three auction sales by a Hindu gentleman, the plaintiff in the suit, who now seeks to have the property partitioned. The defendant Nawab Sultan Begam in her written statement offers, if the Court think that the suit is not barred by limitation and that the plaintiff is entitled to have the property partitioned, to pay to the plaintiff, under the provisions of section 4 of the Partition Act, the value of the share of the property to which he is entitled. On the part of the respondent it is contended that section 4 has no application to Muhammadans, but only to an undivided Hindu family or a family governed by the Hindu law of succession, and relies upon the words in this section "undivided family" as establishing this. Apparently he asks us to introduce the word "Hindu" before the word "family" In the case of *Hashmat Ali* v. *Muhammad Umar* (1) this question came before a Bench of this Court, but the respondents were not represented before the Court. The Court with regret held that section 4 did not apply, except in the case of an undivided Hindu family, and that a Muhammadan could not obtain the benefit of that section. We have serious misgivings as to the correctness of this decision. In a case which came before the Judical Commissioner of Oudh and is reported in 9 Oudh Cases, 156, the Acting Judicial Commissioner held that "the words 'undivided family' must be so interpreted as to include every family, whether it be a Hindu family or otherwise and one which is undivided *quâ* the particular dwelling house, and the words 'dwelling house' must be interpreted to mean not only the house in which the members of an undivided family actually live, but also a house which belongs to the family and in which other members of that family have a right to live if they feel so inclined to do." In view of the importance of the question we think that the issue should be referred to a larger Bench for determination namely, whether or not Muhammadans are excluded from the benefit of section 4 of the Partition Act. We refer the matter to the Chief Justice for the appointment of a larger Bench.

(1) (1907) I. L. R., 29 All., 308.

1908

SULTAN BEGAM v. DEBI PRASAD.

The question referred was then argued before a Bench of three Judges.

Mr. *B. E. O'Conor*, Mr. *Abdul Raoof* and Lala *Girdhari Lal Agarwala*, for the appellants.

The Hon'ble Pandit *Sundar Lal* and Pandit *Moti Lal*, for the respondent.

STANLEY, C.J.—The question which has been referred to us for determination in this case is whether or not Muhammadans are excluded from the benefit of section 4 of the Partition Act, Act No. IV of 1893. This section prescribes that where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family, being a share-holder, shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such share-holder. It is contended on the one hand that the words 'undivided family' as used in this section mean a joint family and are confined to Hindus or to Muhammadans who have adopted the Hindu rule as to joint family property. On the other hand the contention is that the expression is of general application and means a family, whether Hindu, Muhammadan, Christian, *et cætera*, possessed of a dwelling house which has not been divided or partitioned among the members of the family. The Act purports to be a general Act extending to the whole of British India, and admittedly sections 2 and 3 apply to Muhammadans as well as to Hindus. Section 2 enables the Court in a suit for partition, in a case in which a division of property cannot reasonably or conveniently be made and in which a sale and distribution of the proceeds would be more beneficial for all the share-holders, on the request of share-holders interested individually or collectively to the extent of a moiety or upwards, to direct a sale of the property. The succeeding section empowers the Court in a case coming within the previous section, if any share-holder applies for leave to buy at a valuation the share or shares of the party or parties asking for a sale, to order a valuation of the share or shares and to offer the same to such share-holder at the price so ascertained. Then follows the fourth section, and in it we find

nothing to indicate that it was intended to apply to any limited class of the community. The words "undivided family" as used in this section appear to be borrowed from section 44 of the Transfer of Property Act. The last clause of that section prescribes that where the transferee of *a share of a dwelling house belonging to an undivided family* is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the dwelling house. This provision of the Statute is clearly of general application, and the effect of it is to compel the transferee of a dwelling house belonging to an undivided family, who is a stranger to the family, to enforce his rights in regard to such share by partition. There appears to me to be no reason why the words "undivided family" as used in section 4 of the Partition Act, should have a narrower meaning than they have in section 44 of the Transfer of Property Act. If the Legislature intended that section 4 should have limited operation, we should expect to find some indication of this in the language of the section. For example, instead of the words "undivided family" the expression "undivided Hindu family" or "joint family" might have been used.

The question came before a Bench of this Court in the case of *Hashmat Ali* v. *Muhammad Umar* (1), which was a second appeal. The respondent to it was not represented. Our Brothers Knox and Richards in that case held on the analogy of the Full Bench ruling in *Amme Raham* v. *Zia Ahmad* (2) that section 4 did not apply to a Muhammadan family, but they did so with some regret.

In *Amme Raham* v. *Zia Ahmad* it was held that the words "joint family property" in Article 127 of Schedule II of the Limitation Act mean the property of a joint family. In that case the word "joint" which has a settled and well defined meaning is used, and it is in no sense ambiguous. It could not be used as descriptive of property held in common. I fail to discover that there is any analogy between the two cases.

It seems to me that the object of the section, as was pointed out by Mr. Wells, Judicial Commissioner, in the case of *Kalka Parshad* v. *Bankey Lall* (3) is to prevent a transferee of a member

(1) (1907) I. L. R., 29 All., 308 (2) (1890) I. L. R., 13 All., 282.
(3) (1906) 9 Oudh Cases, 158.

1908

SULTÁN BEGAM v. DEBI PRASAD.

of a family who is an outsider from forcing his way into a dwelling house in which other members of his transferor's family have a right to live, and that the words "undivided family" must be taken to mean "undivided *quâ* the dwelling house in question, and to be a family which owns the house but has not divided it." It has been pointed out to us that the Partition Act has been extended to Upper Burma under the Upper Burma Laws Act, No. XIII of 1895. Not part of the Act merely, but the whole Act has been so extended. If section 4 was intended by the Legislature to apply to Hindus only or persons who have adopted the Hindu rule of joint family property, it is unlikely that it would have so extended section 4 in view of the fact that there are very few Hindus in Upper Burma.

For these reasons I would reply to the question referred to us that Muhammadans are not excluded from the benefit of the section in question.

BANERJI, J.—I agree and have nothing to add.

AIKMAN, J.—I also concur in the judgment of the learned Chief Justice.

By THE COURT.—The answer of the Court is that Muhammadans are not excluded from the benefit of section 4 of the Partition Act, Act No. IV of 1893.